1986

The State of Utah v. Richard Lynn Wright : Amended Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 20746
-v-	:	
RICHARD LYNN WRIGHT,	:	Priority 2
Defendant-Appellant.	:	

AMENDED BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF TWO COUNTS AGGRAVATED ROBBERY, FIRST DEGREE FELONIES, IN THE SECOND JUDICIAL DISTRICT COURT, AND AND FOR WEBER COUNTY, DAVID E. ROTH, PRESIDING, AND APPEAL FROM THE DENIAL OF DEFENDANT'S MOTION TO DISMISS, RONALD O. HYDE, PRESIDING.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant was denied due process based upon pre-arrest pre-accusation or delay;

2. Whether defendant's speedy trial rights were violated;

3. Whether prosecution of defendant was barred by Utah's Detainer Act, Utah Code Ann. § 77-29-1 (1982);

4. Whether prosecution of defendant was barred by the statute of limitations, Utah Code Ann. § 76-1-302(1)(a) (1953), as amended; and,

5. Whether defendant's confession to the Weber County offenses to Canadian officials was properly admitted into evidence by the lower court.

IN THE SUPREME COURT OF THE STATE OF UTAH

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-v-	:	Case No. 20746
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Defendant-Appellant.	:	

AMENDED BRIEF OF RESPONDENT

INTRODUCTORY NOTE

Respondent, State of Utah, filed its initial brief in this case on December 12, 1985, and asserted inter alia that appellant had failed to provide an adequate record on appeal to allow this Court to address the merits of appellant's speedy trial claims. This assertion was based, in part, on appellant's failure to provide a transcript of a March 22, 1986 hearing on a pre-trial motion to dismiss wherein appellant's speedy trial claims were first presented to the lower court.

On January 27, 1986, after Respondent's brief was filed, appellant, without leave of court and without notice to respondent, filed with this Court the transcript of the pre-trial hearing (hereinafter designated as "T2."). Respondent learned of the supplementation of the record on February 11, 1986, two days before the scheduled oral argument of this case. Because of this development, the parties stipulated and the Court ordered that (1) the supplemental transcript could be made part of the record on appeal; (2) the respondent could file an amended brief; and (3) the case would be re-calendared for argument on the Court's March, 1986 calendar.

This amended brief is filed in compliance with that order.

STATEMENT OF THE CASE

Defendant, Richard Lynn Wright, was charged with two counts of aggravated robbery, first degree felonies, and two counts of aggravated kidnapping, first degree felonies.

Defendant moved to dismiss the charges on speedy trial grounds, and the motion was heard and denied in a pre-trial hearing on March 22, 1985, the Honorable Ronald O. Hyde presiding.

Defendant was convicted in a jury trial held June 14-17, 1985, of two counts of aggravated robbery in the Second Judicial District Court in and for Weber County, State of Utah, the Honorable David E. Roth, presiding. Judge Roth sentenced defendant to a term in the Utah State Prison of not less than five years but which may be for life for each conviction to run concurrently.

STATEMENT OF FACTS

On September 8, 1976, at approximately 2:00 a.m., two Weber County Sheriff Deputies approached defendant who was parked in an orange Corvette on a secluded road (T. 148-150). Deputy Michael Schlosser requested defendant's driver's license and vehicle registration. When he could not produce the registration, he was asked to step out of the vehicle (T. 150). Deputy Hartman interrogated him (T. 187), while Schlosser walked back to the patrol vehicle to run an NCIC check on the vehicle and the

defendant (T. 152).[1] Hartman was writing the defendant's responses on a field interrogation card when he looked up and saw the defendant pointing a small caliber handgun at him (T. 188-190). Defendant told Hartman to do as he said or he would kill him (T. 189). He placed the weapon against the officer's ribs (T. 190). Defendant then yelled to Schlosser, "I have got a gun in your buddy's back. If you make any funny moves I will kill him (T. 154). Defendant handcuffed Schlosser's and Hartman's hands behind their backs, and ordered them to kneel down and cross their ankles in back, threatening Hartman to "do exactly as I say or I will blow your head off here" (T. 194). Defendant came behind them holding Schlosser's .357 Magnum and cocked the trigger back (T. 157). Schlosser reasoned with him to let them go. Defendant told them to "start walking over toward the river" (T. 157). As the deputies began walking, Schlosser saw defendant inside the patrol car taking out their shotgun. Schlosser told Hartman to run. Hartman ran and fell, striking his forehead and sustaining a severe concussion (T. 197-200). The deputies eventually obtained assistance from brakemen of a nearby train.

Five days later, still suffering from the concussion and resulting complications, Hartman identified a Leonard Wright as the individual responsible for the crime (T. 201-202). However, Leonard Wright was released a few days later after Schlosser positively identified the defendant as the assailant

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[1] Defendant was apparently a federal probationer at the time who had absconded from probation supervision (R. 82).

from a photographic spread (T. 164).[2]

On September 28, 1976, defendant was apprehended while driving an orange Corvette in Kamloops, British Columbia by Corporal Beason and another officer of the Royal Canadian Mounted Police. During the arrest, defendant fired a shot at one of the Canadian officers (T. 254). He was subdued and Beason removed two .357 Magnum firearms from defendant's possession. These were later identified as belonging to Schlosser and Hartman (T. 268-270). Defendant also threatened the Canadian officers at the police station and was kneed in the stomach. He was then placed in a holding cell (T. 238).

Beason interviewed the defendant the following day about the Weber County incident, first informing him that he did not have to say anything, but if he did, it would be given in evidence against him (T. 270). Defendant indicated he understood and gave a written confession concerning the Weber County incident (R. 271).

The defendant was subsequently convicted of numerous unrelated offenses in Canada, receiving a twenty-year sentence in the British Columbia Penitentiary (R. 72). The record establishes that Weber County did not file any charges against

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[2] Defendant claims that charges were filed against Leonard Wright in September, 1976 and a preliminary hearing was held. No evidence was offered to substantiate the latter claim and no transcripts of a preliminary hearing were available for the pretrial hearing or for trial (T2. 293, 298, 300) (T. 202). At the pretrial hearing, the prosecutor said that as the case was set for preliminary hearing it was dismissed against Leonard Wright (T2. 319). Officer Schlosser did not recall a preliminary hearing ever being held (T. 178).

the defendant while he was serving his Canadian sentence nor lodge a detainer with any corrections authorities during the period of his incarceration between 1976 and 1984.[4] Canada is not signatory to the Interstate Agreement on Detainers. See 11 Uniform Laws Ann. 170 (Supp. 1985). In October of 1978, pursuant to the Canadian-American Prisoner Exchange Program, defendant was transferred to the federal penitentiary in Marion, Illinois (R. 72).[5] In September of 1979, defendant was transferred to California pursuant to the Interstate Agreement on Detainers to face state criminal charges there. After completion of those proceedings, he was returned to Marion, Illinois, apparently to continue his federal sentence (R. 71, 81-83). In June of 1982, defendant was transferred to the Utah State Prison apparently to complete his sentence as a federal prisoner (R. 72, 82-83).

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[4] The only charging documents in the record are those filed against the defendant in 1985 (R. 1-15). The only reference to any detainer supposedly being lodged is in a letter from defendant's federal probation officer dated August 31, 1983, attached to defendant's motion to dismiss filed below (R. 82). However, there is no copy of any such detainer in this record. The prosecutor's memorandum in reply to the motion to dismiss states that "defendant was not arrested nor charged with the current violations until the recent filing of the Information before the Court . . . in January of 1985" (R. 31). At the pre-trial motion to dismiss hearing, the prosecutor similarly stated that "there was no pending charge against this defendant" until January of 1985, and there is no duty on the State to lodge a detainer against a suspect (T.2, 378). Defense counsel even conceded at the hearing that no detainer had been lodged (T2. 294) and that charges against defendant were not filed until he was later incarcerated in the Utah State Prison (T2. 296). The defense merely argued that a complaint had been filed against the wrong person, Leonard Eugene Wright (T2. 293, 298, 330-331).

[5] The record does not disclose whether the defendant was thereafter incarcerated to serve the balance of his Canadian sentence, to serve the balance of a prior federal sentence, or to serve time on new federal convictions (R. 72, 82) (T2. 294).

He was advised by Utah Prison authorities of his speedy trial rights and the right to make a demand to have any untried charges disposed of and how to assert those rights (T2. 307-309, 312). He signed an acknowledgement of having been so advised (R. 30, 84) (T2. 305-306, 310).

At no time between 1976 and January, 1985 did defendant contact Weber County officials to inquire as to the status of any case which might be pending against him (T2. 300, 318, 322-323, 334).

He was arraigned on the present charges in January, 1985. He moved to dismiss the charges on speedy trial grounds on March 11, 1985. The matter came on for hearing on March 22, 1985 before the Honorable Ronald O. Hyde. Defendant presented no evidence at said hearing and merely argued his motion. Judge Hyde denied the motion (T2. 33-334). Defendant was convicted of two counts of aggravated robbery in a jury trial held on June 14-17, 1985.

SUMMARY OF ARGUMENTS

The record establishes that Weber County did not file charges against the defendant until January, 1985. Trial commenced June of 1985. No speedy trial issue is present in this case. The defendant has not claimed a denial of due process rights based upon a theory of pre-accusation or pre-arrest delay in this appeal. Should this Court reach that issue, no due process rights were violated because the record neither establishes substantial prejudice to defendant nor intentional delay designed to gain tactical advantage over him. Assuming

defendant's speedy trial claims could be reached, his right to a speedy trial was not violated because the purposes behind the constitutional speedy trial provisions are not present in this case. Assuming they are present, when factors such as length of the delay, reasons for the delay, the lack of any request for a speedy trial and the lack of a showing of actual prejudice are weighed, there was no denial of speedy trial rights in this case.

Prosecution of the defendant was not barred by Utah's Detainer Act, Utah Code Ann. § 77-29-1 (1982), because no charges were pending against defendant upon which a request for disposition of a detainer could be made until 1985. Even if charges had previously been filed and a detainer lodged, defendant made no request for disposition of the Weber County charges so as to trigger the running of the time limits for prosecution under Utah's Detainer Act.

The statute of limitations was tolled during the time the defendant was out of the State, and thus did not bar his prosecution.

Defendant's confession to the Weber County offenses to Canadian officers was properly admitted into evidence by the lower court.

ARGUMENT

POINT I

DEFENDANT WAS NOT DENIED HIS FEDERAL OR STATE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The United States Supreme Court in United States v. MacDonald, 456 U.S. 1, 6 (1982), held that the federal

constitutional right to a speedy trial "attaches only when a formal criminal charge is instituted and a criminal prosecution begins" and "does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused." Citing United States v. Marion, 404 U.S. 307, 313 (1971), the Court said:

> On its face, the protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

The MacDonald Court noted that delay prior to arrest or indictment may give rise to a due process claim or to a claim under any applicable statute of limitations, but that no right to a speedy trial arises until charges are pending. Id. at 7-8. See also United States v. Loud Hawk, ____ U.S. ____, 38 Cr.L. 3075 (Jan. 21, 1986); and State v. Bailey, No. 19812, slip op. at 3-4) (Utah Supreme Court, Dec. 31, 1985). Cf. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161(d), 3161(h)(6).

The record in this case establishes that Weber County prosecutors did not file charges against the defendant prior to January of 1985 (R. 1-15, 31)(T2. 296, 328), and defendant does not complain of the six-month delay in bringing him to trial after the 1985 informations were filed. Nor does he assert a claim of pre-accusation or pre-arrest delay on due process grounds other than his statute of limitations argument which is treated elsewhere in this brief.

His entire argument on appeal is a speedy trial claim based upon the unsupported premise that Weber County filed charges against him sometime when he was in custody on his Canadian convictions. The record contains no such earlier charging documents, or copies of any detainers which might have been lodged with any corrections officials between 1976 and 1984. The only reference to a detainer possibly being filed is a tangential reference in a letter from a federal probation officer which was apparently attached to defendant's motion to dismiss (R. 82). There is no indication this letter was ever offered into evidence in any lower court proceedings. The prosecutor in his memorandum in reply to defendant's motion to dismiss stated: "defendant was not arrested nor charged with the current violations [sic] until the recent filing of the Information . . . in January of 1985" (R. 31). The prosecutor made similar representations at the pre-trial hearing on the motion to dismiss, and defense counsel even conceded that no charges had been filed against defendant nor detainers lodged prior to that time (T2. 294, 296, 328). The charging documents in the record on appeal supports this view (R. 1-15). This Court should therefore not reach the merits of defendant's speedy trial claims which are supported only by his own, unsubstantiated and self-serving factual allegations in his brief on appeal.

Although defendant has not framed the issue as one of denial of due process based upon pre-accusation or pre-arrest delay, should this Court choose to reach the issue, no violation of due process occurred in this case.

In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court noted that statutes of limitations are the primary guarantee against the bringing of overly stale charges (404 U.S. at 322), but that due process may require dismissal of charges if the defense can show at trial that the pre-accusation, pre-indictment or pre-arrest delay caused "substantial prejudice" to the defendant's right to a fair trial and that "the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. These questions must be decided "on the circumstances of each case." 404 U.S. at 325. The Court concluded that the defendants had neither alleged nor proved actual prejudice and there was no showing the Government intentionally delayed to gain some tactical advantage over them or to harass them. Id.

In United States v. Lovasco, 431 U.S. 783 (1977), the Supreme Court found that even where a defendant might establish actual prejudice at trial from pre-accusation delay, this merely makes the due process issue concrete and ripe for adjudication (431 U.S. at 789), and the reasons for the delay must also be considered. Id. at 790. The Court refused to adopt a rule requiring prosecutors to file charges as soon as they are legally entitled to do so or once they have assembled sufficient evidence to prove guilt beyond a reasonable doubt. Id. at 792-794. Such a rule would not take into account "a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." Id. at 794. One such factor cited by the Court was the

"availability and likelihood of prosecution by another jurisdiction." Id. n. 15. (This situation was clearly present in the instant case.) Applying due process principles of fundamental fairness, the Lovasco Court refused to find a due process violation despite defendants' showing of prejudice (the death of two material witnesses during the period of the delay).

In State v. Bailey, No. 19812, slip op. at 3-4 (Utah Supreme Court, Dec. 31, 1985), a pre-arrest delay case, the defendant claimed prejudice because of the loss of contact with two alibi witnesses. This Court applied the tests established in Marion and Lovasco requiring that defendant show "substantial actual prejudice" and "intentional delay designed to produce an advantage for the prosecution." No due process violation was found.

In the present case, the requisite showing of substantial prejudice so as to make the due process issue "concrete and ripe for adjudication," Lovasco, 431 U.S. at 489, has not been made. Defendant merely furnished his own self-serving affidavit with his motion to dismiss alleging that an alibi witness had died and another had become senile during the period of the delay (R. 26-27, 29). He offered no evidence at the pre-trial hearing or at trial to substantiate this claim. No death certificates or medical reports were submitted. Defense counsel even indicated he was uncertain when the one witness had died (T2. 301). At trial, the defendant merely made a "statement," not under oath, that (1) he left California with an unknown male person (he could not remember his name); (2) he went to Arizona to stay with his uncle

and mother; (3) while there, a friend borrowed his car, drove to Utah, and returned with guns which he gave to the defendant; (4) his uncle died in 1980 and his mother has become senile; (5) while in Arizona, he had a girlfriend and two male friends but he could not remember their names; and (6) his ex-wife, who police interviewed regarding this case, had also died (T. 132-134). Defendant offered no evidence to substantiate any aspect of this "statement" and failed to even explain what evidence these witnesses may have provided. The State refuted defendant's "statement" by introducing evidence of defendant's confession to the Utah crimes to Canadian authorities (T. 271), and the property of the Weber County sheriff's officers found in defendant's possession when he was arrested in Canada (T. 268-270).

Defendant also claims prejudice because of his purported inability to locate and subpoena Leonard Wright, the person initially identified by one of the victims as the assailant, and the disappearance of photographs of Leonard Wright and unavailability of transcripts of a preliminary hearing purportedly held for Leonard Wright. First, there is nothing in the record to establish to what extent attempts were actually made by the defense to locate and subpoena Leonard Wright (T. 134). Second, the record reflects that the defense apparently did not even attempt to locate any photographs of Leonard Wright prior to making a surprise request for them on the prosecutor at the outset of trial (T. 139). Finally, as noted earlier, the record does not establish that a preliminary hearing was ever held for Leonard Wright. Rather, it appears that charges were dismissed against him before the preliminary hearing stage.

Even assuming that defendant has made a sufficient showing of "substantial" prejudice, there is nothing to indicate that the Government's delay in this case was intentional to gain a tactical advantage over the accused. At the pre-trial hearing the defense conceded it had no specific facts to establish that the delay was deliberate or purposeful (T2. 295, 297). The prosecutor offered no explanation for the delay other than defendant's obvious incarceration on a Canadian conviction with a twenty-year sentence and the lack of a detainer agreement with Canada (T2. 325). Judge Hyde expressly found no deliberate delay in this case (T2. 334).

Based on the foregoing, defendant was not denied due process of law by the pre-accusation and pre-arrest delay in this case.

Should this Court somehow find that charges were, in fact, pending against defendant before 1985, so that defendant's speedy trial claims might be reached, there has been no violation of his right to a speedy trial under the facts of this case.

The right to a speedy trial is guaranteed in the U.S. Constitution, Amendment VI; Utah Constitution, Art. I., § 12. See also Utah Code Ann. § 77-1-6 (f) (1953), as amended. The right is:

> . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to

> shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

United States v. MacDonald, 456 U.S. at 8. The focus is on the impairment or "restraint on personal liberty, disruption of employment, strain on financial resources, and exposure to public obloquy. . . . " Id. at 9. See also United States v. Marion, 404 U.S. at 320. Similarly, in State v. Weddle, 29 Utah 2d 145, 506 P.2d 67, 68 (1973), this Court noted that:

> The right to a speedy trial assured by our Constitutions refers, of course, not to the speed at which a trial proceeds, but rather to the right of an accused to be brought to trial without undue delay. This is a right of ancient origin which arose because of abuses wherein people were kept in custody for unreasonable periods of time without trial and even without knowing any abuse of that character. But in the absence thereof, it should not be extended as a mere abstraction of law in circumstances where there is no justification for its application. The statement itself is general and there is no particular length of time which can be specified as a standard in all instances in order to avoid infringement of the right. The correct application of the principle depends upon the facts of each case. The total picture should be looked at to see whether there has been any such abuse of imposition upon the accused as the provision was designed to protect against, so that he was prejudiced in having a fair trial and just treatment under the law.

In State v. Archuletta, 577 P.2d 547, 548 (Utah 1977), this Court stated:

> The purpose of those constitutional provisions is to guard against any intentional delay which may be oppressive or persecutorial in nature. U.S. v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. 627 (1966).

Most of the concerns behind speedy trial provisions do not appear to be present in the instant case. Assuming Weber County had filed charges as early as 1976 as defendant suggests, there was no oppressive pre-trial incarceration stemming from such charges. Rather, the defendant was incarcerated on numerous unrelated convictions in other jurisdictions. Under such circumstances, the concerns of loss of liberty, disruption of employment, strain on financial resources and exposure to public obloquy are clearly non-existent. More-over, the defendant certainly was aware of the Utah offenses and even confessed to them to Canadian officials in late 1976, yet he expressed no desire over the eight-year period to have them resolved. Any concern that his defense might be jeopardized by the delay was perhaps outweighed by his hope that the delay would minimize the chances of the charges ever being filed or his being brought to trial.

Assuming the purposes behind the speedy trial provisions were present in this case, the facts of each case should be reviewed. The United States Supreme Court has noted that whether the federal speedy trial right has been violated is determined by balancing the ". . . length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972). Similar considerations also apply under the Utah Constitution. State v. Lairby, 699 P.2d 1187, 1193 (Utah 1984); State v. Knill, 656 P.2d 1026, 1029 (Utah 1982); State v. Velasquez, 641 P.2d 115, 116 (Utah 1982); State v. Hafen, 593

P.2d 538, 541 (Utah 1979); State v. Giles, Utah, 576 P.2d 876, 879 (1978). This Court elaborated on the above factors in State v. Weddle, 506 P.2d at 68, as follows:

> In making that determination, where there has been what may appear to be undue delay, it is important to consider whether or not there was justification for it including: (1) which party caused it; (2) whether it may have been wilful and/or for some improper purpose; (3) whether the defendant was aware of his rights; (4) whether he made known his desire for a speedy trial; (5) whether by words or conduct there was explicit or implicit waiver: and (6) whether the proceeding was completed as soon as reasonably could be done in the circumstances.

Those factors, of course, assume that the delay occurs after charges are filed--a situation which has not been established in this case. Assuming the charges had been filed, an application of these factors demonstrates no violation of defendant's speedy trial rights.

1. LENGTH OF DELAY.

Although the purported delay in this case was lengthy, (over eight years), the Supreme Court in Barker stressed there is no precise point at which the delay becomes prejudicial per se. Rather, the inquiry must be determined on an ad hoc basis considering the circumstances of each case. Id. at 530-31. In Barker, the delay between arrest and trial was over five years, but because of countervailing factors, the conviction was upheld. The same result should be reached in this case.

2. REASONS FOR THE DELAY.

There were valid reasons for the delays by the government given all of the circumstances. Moreover, the delays

could also be deemed attributable to acts of the defendant.

In Barker, the Supreme Court stated:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. (Footnote omitted, emphasis added.)

407 U.S. at 531. See also United States v. Ewell, 383 U.S. 116, 120 (1966) (the right of speedy trial is consistent with appropriate delay). And in State v. Archuletta, 577 P.2d 547 (Utah 1977), referring to the right of speedy trial, this Court stated:

> The purpose of those constitutional provisions is to guard against any intentional delay which may be oppressive or persecutorial in nature. . . . [T]he court does not lose jurisdiction . . . unless there is some intentional delay of an oppressive character, which results in prejudice to the defendant[.]

Id. at 548-49.

Also, the rule is firmly established that any delay attributable to the defendant should not be considered in determining whether his right to a speedy trial was denied. See State v. Weddle, 506 P.2d at 68; State v. Velasquez, 641 P.2d at 116, (under former

Utah statute[5] requiring that a prisoner be brought to trial within 90 days, where defendant himself has requested a continuance, the disposition period shall "be extended by the amount of time during which defendant himself has created delay"). State v. Kelly, 123 Ariz. 24, 597 P.2d 177, 179 (1979) (any delay occasioned by defendant is excluded time under speedy trial rule); and Cherniwchan v. State, 594 P.2d 464, 468 (Wyo. 1979) (defendant may be disentitled to speedy-trial safeguards where the delay is all or partly the responsibility of the defendant).

Mr. Wright fled the jurisdiction of not only Weber County, but of Utah and the United States. He then committed further offenses in Canada which led to his apprehension, conviction and incarceration in that foreign country where he received a twenty-year prison sentence. While serving the initial two years of that sentence, he was beyond Utah's jurisdiction which effectively precluded Weber County from commencing its prosecution. In October, 1978, he was transferred to the United States under the Canadian-American Prisoner Exchange program and served time in federal prison at Marion, Illinois.

Arguably, Utah might have been able at that time to obtain jurisdiction to try him under Article IV of the Interstate Agreement on Detainers (IAD), Utah Code Ann. § 77-29-5 (1982) had charges been filed. However, the defendant could also have demanded disposition of any Utah detainer under Article III of the IAD. He made no efforts in this regard. Moreover, the record is

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[5] Utah Code Ann. § 77-65-1 (1953) (repealed 1980).

not clear as to whether Utah officials were even notified of defendant's transfer to Marion, Illinois so that charges could be filed, a detainer lodged, and a request for temporary custody initiated. In any event, California effectively precluded Utah from obtaining custody of the defendant when in September, 1979 they took custody of him pursuant to either defendant's request for disposition of a California detainer, or a California prosecutor's request for temporary custody under the IAD. (The record does not indicate who initiated this action). Under the terms of the IAD, the defendant would not have been available to Utah for prosecution during the period he was in California. See Utah Code Ann. § 77-29-5 (Article V (d) (1982)), and Cf. Gibson v. Morris, 646 P.2d 733 (Utah 1982). Moreover, the record does not indicate how long defendant remained in California's custody. It merely reflects that he so remained until the charges were resolved, after which he was returned to Marion, Illinois (T. 71, 82).

In June, 1982, the defendant was transferred to the Utah State Prison as a federal prisoner (R. 82). At no time prior to or after this transfer did he request a speedy trial or disposition of the Weber County matter pursuant to the IAD, or Utah's own Detainer Act, Utah Code Ann. § 77-29-1 (1982), which could have been invoked by the defendant after he arrived at the Utah Prison (assuming charges were pending).

State v. Weddle, 29 Utah 2d 145, 506 P.2d 67 (1973), involved facts somewhat analogous to the instant case. The defendants were being held in Davis County Jail on murder charges committed in that county. Weber County filed a separate robbery

complaint, but deferred prosecuting their case until the Davis County charges were resolved. The defendants claimed a denial of their speedy trial rights to which this Court responded as follows:

> It was through their own conduct that they were confined in the jail in Davis County awaiting trial for the crime of murder. In that proceeding they were represented by counsel. They had been served with warrants in this case and knew that it was pending against them. It is reasonable to assume that they knew of their legal rights. Nevertheless, it does not appear that they indicated any desire to expedite the proceedings in this case until the notice filed by defendant Weddle on February 22, 1972. We see nothing unreasonable about the Weber County authorities deferring to Davis County and not interfering therewith until that charge was disposed of. More importantly, we do not see how the defendants were in any way prejudiced by the delay which occurred. It is to be noted that when that proceeding was completed, and demand was made by the defendants, the proceedings in this case moved with reasonable expedition. There is certainly nothing made to appear which would warrant the abrogation of the serious charge of robbery of which the defendants stand convicted.

From the foregoing, there are no facts which would indicate that the State's actions were intentionally oppressive, dilatory, willful, for an improper purpose, or negligent. Moreover, the delay was partially attributable to acts of the defendant.

3. DEFENDANT'S EFFORTS TO ASSERT HIS RIGHT.

In Barker v. Wingo, 407 U.S. 514, 521 (1972), the Supreme Court pointed out that the right to a speedy trial is different from other constitutional rights, in that the deprivation of that right may in fact work to the defendant's advantage. The Court further stated:

> Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Id. at 521-22. Consequently, an important factor in deciding whether there has been a violation of the right to a speedy trial is whether the defendant has made efforts to assert this right. The Supreme Court stated that a defendant has no duty to bring himself to trial, but this "does not mean, however, that the defendant has no responsibility to assert his right." Id. at 527, 528. The Supreme Court added:

> The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to a strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. (Emphasis added.)

Id. at 531-32.

Similarly, this Court has stressed that the defendant must assert his right to a speedy trial. State v. Lairby, 699 P.2d 1187, 1191 (Utah 1984); State v. Knill, 656 P.2d 1026, 1028 (Utah 1982); and State v. Menzies, 601 P.2d 925 (Utah 1979).

This Court has also recognized that a defendant may implicitly or explicitly waive his right to a speedy trial through words or conduct. Weddle, 506 P.2d at 68.

Defendant argues that even though he did not request disposition of the charges that were purportedly pending against him, ". . . the reasons for the invocation of the speedy trial guarantee are just as compelling." He cites Dickey v. Florida, 398 U.S. 30 (1970). But in Dickey, the defendant made diligent and repeated efforts by motions in the State courts to secure a prompt disposition of the charges pending against him. The Court also found that the defendant was available to the State at all times during the seven-year period before he was brought to trial. In 1962 Dickey filed a petition styled "Writ of Habeas Corpus Ad Prosequendum" naming the State Attorney as respondent and asking that he be required to show cause why he should not be ordered to either take the steps necessary to obtain Dickey's presence for trial or withdraw the detainer for failure to provide Dickey with a speedy trial. Dickey filed papers raising substantially the same contentions on two later occasions: April, 1963 and March, 1966. Dickey next petitioned the Supreme Court of Florida to issue a writ of mandamus ordering the Circuit Court to either secure his return for trial or withdraw the detainer against him. Dickey again filed in September of 1967. The United States Supreme Court reversed Mr. Dickey's subsequent conviction because of these repeated efforts. Defendant's lack of even a single effort to assert his right to a speedy trial or file under the Interstate Agreement on Detainers is clearly distinguishable.

In summary, if this Court were to find that defendant, despite his conduct, has not waived his right to a speedy trial outright, then at the very least the "assertion of right" factor should weigh heavily against him in the Barker balancing analysis.

4. PREJUDICE TO THE DEFENDANT

The only remaining issue under the four-prong standard articulated in Barker v. Wingo is whether defendant suffered prejudice by virtue of the delay. Evaluation of the prejudice suffered by a defendant due to delay should logically be assessed in light of the interests which the speedy trial right was designed to protect. As was shown earlier, those interests are not even present in the instant case. The concern of oppressive pretrial incarceration clearly does not apply here. Defendant argues that he has suffered the oppression and anxiety discussed in Klopfer v. North Carolina, 386 U.S. 213, (1967). In Klopfer the sole issue on appeal was whether a state may indefinitely postpone prosecution on an indictment without stated justification over the objection of a defendant who has been discharged from custody. Klopfer was a professor at Duke University and as such, sensitive to publicity. Defendant, on the other hand, has been incarcerated on serious felony charges since 1976. Defendant, failing to assert his speedy trial rights, demonstrated little or no anxiety and concern over the pending charges.

Defendant next complains that he has suffered an identical loss of witnesses such as required a reversal of the conviction in Dickey v. Florida, 398 U.S. at 38. In Dickey, the Court noted there was present in the record abundant documented

evidence of actual prejudice. Defendant offers no evidence of actual prejudice, simply stating that his alibi witnesses have become permanently unavailable (R. 132-133). He alleges an uncle, Earl Pidge, died in 1980. He offered no death certificate into evidence. There is also no explanation of why Mr. Pidge's statement could not have been obtained between 1976 and 1980 (assuming charges were pending against defendant at that time). Defendant contends his other alibi witness, Mrs. Velma Wright, his mother, became senile in 1980 (R. 133). Again, defendant fails to offer documentation or medical records to substantiate his claim. The defendant finally argues he had three friends who would have been helpful to his defense but he has forgotten their names and addresses.

Defendant's allegation of being denied the opportunity of asserting and proving an alibi defense must be balanced against defendant's confession to the crime to Canadian authorities. United States v. Jackson, 369 F.2d 936 (1966). Also, when apprehended in Canada, he was in possession of the firearms taken from the Weber County deputies (R. 141). Finally, the prejudice factor should be evaluated in light of the fact the defendant himself did not appear to desire a speedy trial until he moved to dismiss the charges on speedy trial grounds in 1985. It is reasonable to suspect he thought the delay would work to his advantage.

This Court has repeatedly refused to reverse convictions where the defendant has failed to establish any specific or real prejudice. See e.g., State v. Lairby, 699 P.2d

at 1193 (no prejudice where both defendants were granted pretrial release); State v. Knill, 656 P.2d at 1029 (defendant "makes no persuasive allegation of prejudice from the delay"); State v. Menzies, 601 P.2d at 926 ("period which elapsed before trial neither inconvenienced nor prejudiced defendant"). In the present case, any prejudice to defendant was purely speculative. The case against defendant was strong, and there is no evidence of real harm to the trial defense. Defendant makes no persuasive allegation of prejudice.

Based upon the foregoing, there has been no violation of defendant's right to a speedy trial in this case.

POINT II

PROSECUTION OF DEFENDANT WAS NOT BARRED BY UTAH'S DETAINER ACT, UTAH CODE ANN. § 77-29-1 (1982).

Utah's Detainer Act, Utah Code Ann. § 77-29-1 (1982), provides:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
> (2) Any warden, sheriff or custodial officer, upon request of the demand described in subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk.

As noted in Point I, supra, the record in this case establishes that no "untried indictment or information" was "pending" against Mr. Wright until charges were filed by Weber County in January of 1985 (R. 1-15). Thus, until that time, there was no basis upon which a request for disposition of a "pending charge" could have been made under § 77-29-1.

There is also nothing in the record to indicate that defendant ever submitted the requisite written demand requesting disposition of any pending charge, in order to trigger the provisions of § 77-29-1, at any time during his incarceration in the Utah State Prison. Such a request is clearly required to commence the running of the 120-day period.[6] State v. Viles, 702 P.2d 1175, 1176 (Utah 1985).

Defendant claims that a federal probation officer's letter of inquiry to the Weber County Attorney's Office dated August 31, 1983 (R. 82) satisfied the notice and request requirements of § 77-29-1. That letter was written over a year before charges were actually pending and falls miserably short of the formal written demand required by the statute. State v. Viles, Id. It was nothing more than a letter indicating that the federal probation officer had filed a probation violator's detainer against Mr. Wright and a court in California was in the process of evaluating the appropriateness of their retaining that detainer. Accordingly, he was attempting to determine for the

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[6] The record does indicate that defendant was advised by Utah prison officials of the procedures for invoking the provisions of the detainer act, and that defendant signed an acknowledgment of being so advised (R. 30, 84) (T2. 305-306, 308, 310).

benefit of the court (not Mr. Wright) which jurisdictions were maintaining an interest in prosecuting him. The letter clearly did not comport with the requirements of the statute as it was not written in behalf of defendant, it was not directed to the warden, it was not a demand specifying the court wherein charges were purportedly pending, and it was never served on a court clerk.

Based on the foregoing, the provisions of Utah's Detainer Act did not bar the prosecution of defendant under the facts of this case.

POINT III

PROSECUTION OF THE DEFENDANT WAS NOT BARRED BY THE STATUTE IF LIMITATIONS, UTAH CODE ANN. § 76-1-302(1)(a) (1953), AS AMENDED, BECAUSE IT WAS TOLLED DURING THE PERIOD OF TIME DEFENDANT WAS OUT OF THE STATE.

Utah Code Ann. § 76-1-302(1)(a) (1953), as amended, establishes a four-year statute of limitations for a felony. However, Utah Code Ann. § 76-1-304 (1953), as amended, provides that:

> The period of limitation does not run against any defendant during any period of time he is out of the state following the commission of an offense.

The record establishes that immediately after the commission of the Weber County offenses in September of 1976, defendant left the jurisdiction of Utah and so remained until he was transferred to the Utah State Prison to serve the balance of time on a federal sentence. According to the Utah prison's orientation form (offered as State's Exhibit No. 1 in the pre-trial hearing on defendant's motion to dismiss; R. 84), defendant

arrived at the Utah prison on or about June 21, 1982. Lt. Michael Pierson of the Utah State Prison also testified that defendant arrived at the prison in June, 1982. There is no indication that he ever set foot in Utah prior to that date. Trial commenced on June 14, 1985, three years after his arrival back in Utah, and well within the four-year statute of limitations period.

Defendant concedes he was out of the jurisdiction between September, 1976 and June, 1982, but claims that in the interest of justice the statute of limitations should be deemed to have run because he was incarcerated in other jurisdictions during that time. His incarceration was obviously based on his own acts of misconduct. Moreover, the reasons for the absence from the jurisdiction is wholly irrelevant for statute of limitations purposes. See Couture v. Commonwealth, 338 Mass. 31, 153 N.E.2d 625 (1958) (the period of a person's imprisonment in another state or country should be excluded in determining whether his indictment was barred by the statute, though his departure or absence was not voluntary). See also People v. Posten, 108 Cal. App. 3d 633, 166 Cal. Rptr. 661 (1980).

Based on the foregoing, the statute of limitations was not a bar to defendant's prosecution.

POINT IV

DEFENDANT'S CONFESSION TO CANADIAN AUTHORITIES WAS PROPERLY ADMITTED INTO EVIDENCE BY THE LOWER COURT.

Defendant claims that the confession to the Weber County offenses which he gave to Canadian authorities was improperly admitted into evidence in violation of his Fifth and Sixth Amendment rights under the United States Constitution. He claims the confession was not voluntarily given due to police coercion and that he was refused the right to counsel prior to his giving the confession.

The defense apparently filed no pre-trial motion to suppress the defendant's confession. Nor was any objection raised at the outset of trial or immediately before a Canadian officer was called to testify on the matter (T. 132-143; 220-224). However, at some point during the trial, the prosecutor apparently made a proffer of his evidence concerning defendant's confession (T. 225, 226). This proffer was not recorded. The judge later indicated he had researched the question of whether the failure of a peace officer in a foreign jurisdiction to give a full Miranda warning rendered the evidence inadmissible. He concluded that it did not and that the only condition on admissibility would be whether the confession was voluntarily given (T. 225). The judge then offered to hold a hearing outside the presence of the jury on the question of voluntariness. Defense counsel objected, but conceded he had not done any research on the question (T. 226). A hearing was then held outside the presence of the jury.

Corporal Beason, a Canadian police officer, testified that he approached the defendant who was in an orange Corvette; asked him for a driver's license and vehicle registration; asked him to step out of the car; observed a revolver in his waistband under his shirt; retrieved the gun; attempted to place him up against the police car when a struggle broke out and defendant had to be subdued (T. 231-232). Defendant was rendered unconscious in the fray (T. 238). He was later placed under arrest (T. 232).

When defendant was taken to the police office to be fingerprinted, he resisted saying "there was nobody there big enough to take his prints" (T. 238). The prints had to be forcibly taken and when he signed the fingerprint card, he signed "John F. Kennedy." Beason then kneed him in the stomach and placed him in a holding cell at 4:00 a.m. on September 28, 1976 (T. 238). Beason explained that he did not knee him merely because he signed a bogus name on the card, but because "the man had attempted to shoot us during the course of the struggle, and . . . my patience was a little thin at that time" (T. 251). Beason attempted to talk with him at 9:00 a.m. and defendant refused to talk (R. 238). Beason met with him again at 4:50 p.m. (T. 238). No other officers were present (T. 241, 246). Defendant was told he did not have to say anything and anything he said would be used in evidence against him (T. 232, 247). Beason verified that Canadian law did not require advising of the right to counsel until 1981 (T. 237). Defendant indicated he understood the warning and then confessed to taking the gun from two Utah deputies (T. 232-233). Defendant was asked if he had anything to

hope or fear in talking with Officer Beason and he replied that he was not afraid of him (T. 233). No promises or threats were made to him (T. 247, 250). Defendant then signed a written statement confessing to the Weber County offenses (T. 242).

Mr. Wright also testified out of the presence of the jury and, as could be expected, refuted much of Officer Beason's testimony (T. 252-259). Notably, he admitted he had been given Miranda warnings many times before 1976 and was very familiar with them at that time (T. 257). Accordingly, his testimony painted a picture of a host of hostile police officers, and a frightened defendant who feared for his life, who was not advised whatsoever of any of the Miranda-type warnings, who pleaded for an attorney, and who was forced to give a statement against his will. He closed his testimony saying, "If you can lie, I can lie to" (T. 259). Defendant did add some detail which complimented Officer Beason's testimony. He said he (defendant) was "drunk as a skunk" when Beason first approached him (T. 253); a shot had been fired at one of the officers when they grabbed him (T. 254); they took him to a hospital before taking him to the police station (T. 253-254); he "got smart at them" when his fingerprints were taken (T. 254); and he admitted he signed a statement for the police (T. 258).

After hearing arguments of counsel, the judge ruled that strict adherence to the Miranda rule does not apply when a statement is given to an officer of a foreign country because the Miranda rule is intended to deter police officers in the United States from misconduct in interrogation and taking statements.

There is no deterrent effect outside this country. He said the issue then becomes whether the statement was voluntary (T. 263). Considering there was a struggle; a shot was fired; the officers appeared to be threatened; defendant resisted when being fingerprinted; there was no indication of violence in connection with any effort to take statements; and any statements given concerning the Weber County offenses would not have been central to any investigation in Canada and thus would likely have been voluntarily given, the judge found under all of the facts and circumstances, that the statements were made voluntarily and were admissible (T. 264-265). The defendant's confession was later admitted into evidence at trial (T. 273-274).

The judge's ruling is amply supported by case law. The defendant even concedes that "a number of courts have held that failure of law enforcement officials in a foreign country to give a Miranda warning does not render a confession inadmissible" and that "[t]he cases have further held that it is necessary to look closely at the voluntariness of the confession." (Appellant's brief at 20). This is indeed the prevailing view. See United States v. Chavarria, 443 F.2d 904 (9th Cir. 1971); State v. Vickers, Wash. App., 604 P.2d 997 (1979); State v. Mayer, Wash. App., 613 P.2d 132 (1980); State v. Cranford, 83 N.M. 294, 491 P.2d 511 (1971); State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972); Johnson v. State, Okla. Cr., 448 P.2d 266 (1969); and People v. Helfend, 1 Cal. App. 3d 873, 82 Cal. Rptr. 295, 307 (1969). The chief aim of the Miranda exclusionary rule is to deter United States police misconduct during interrogations.

Where the police are of a different country, no such deterrent effect would result from application of the exclusionary rule. Chavarria, 443 F.2d at 906. The real question in such situations is whether statements given to officers in foreign jurisdictions were voluntary, State v. Shelby, 69 Wash. 2d 295, 418 P.2d 246 (1966), and the burden is on the state to establish such voluntariness. Tague v. Louisiana, 444 U.S. 469 (1980).

The evidence of this case, as summarized above, clearly establishes the voluntariness of defendant's confession in this case and amply supports Judge Roth's finding of voluntariness. The confession was, therefore, properly admitted at trial.

CONCLUSION

Based upon the foregoing, defendant's conviction should be affirmed.

DATED this 25th day of February, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing brief, postage prepaid, to Bernard L. Allen, attorney for appellant, RICHARDS, CAINE & RICHARDS, 2568 Washington Boulevard, Ogden, Utah, this 25th day of February, 1986.

Earl F. Dorius